Supreme Court, U.S.
FILED

No.

091474 MAY 31 2010

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

JAMES DICKEY,
Petitioner
v.

INSPECTIONAL SERVICE DEPARTMENT of the, CITY OF BOSTON,
Respondent

In Petition For A Writ Of Certiorari to
The United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a "padlock law", which the City of Boston has implemented through it's interpretation of the Massachusetts Sanitary Code, is unconstitutional since the challenged policy allows the City to seize any building with neither notice nor hearing when the possession and right-of-entry of the building automatically transfers to the City of Boston; which impinges on the building owner's Fourth, Fifth and Fourteenth Amendment rights.

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Petition for a Writ of Certiorari

James Dickey respectfully petitions for a Writ of Certiorari to review the final ruling of the United States Court of Appeals for the First Circuit.

Opinions Below

The First Circuit's opinion, affirming the district court's judgment is unreported, and is attached as *Exhibit A*, page 1a. The opinion of the district court is unreported, and is attached as *Exhibit B*, pages 2a-28a.

Jurisdiction

The United States Court of Appeals for the First Circuit affirmed the district court's judgment on March 1, 2010. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

"The Fourth Amendment, made applicable to the States by the Fourteenth, provides in pertinent part that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...'"

The Due Process Clause of the Fifth Amendment, made applicable to the States by the Fourteenth, guarantees that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law.'

The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part that: "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Under color of authority, the Respondent, the City of Boston, ("City"), through the Inspectional Services Department, ("ISD"), has implemented a "padlock law" that enables the City to seize any building, without notice or hearing in regards to the seizing/taking/padlocking of the building. (When the City finds a building uninhabitable pursuant to 105 CMR 410.831 of the Massachusetts Sanitary Code,[1] the City's interpretation of the Code allows the City to automatically take possession/control/deny the owner right-of-entry to the building, without further notice or hearing in regards to the taking, see *Appendix B*, page 17a.) While the challenged "padlock law" can appear to be in the public's interest, the policy of seizing properties creates abandoned buildings, violates constitutional rights and enables ISD personnel to confiscate the targeted properties for their own benefit.[2]

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[1] In pertinent part, 05 CMR 410.831(A) of the Massachusetts Sanitary Code states: "If an inspection conducted pursuant to 105 CMR 400.100 or 105 CMR 410.820 reveals that a dwelling or portion is unfit for human habitation, the board of health may ... issue a written finding that the dwelling or portion thereof is unfit for human habitation."

[2] See *Dickey v. Kennedy*, 583 F.Supp.2d 183 (D.Mass 2008), for information on an extortion scheme involving ISD employees.

First, the City seizes a building, (by placing plywood boards over the front and rear doors and all windows on the first floor), which denies the owner access to the building; then tells the owner he will be arrested for trespassing if he enters the boarded building. The City subsequently holds a condemnation hearing to determine the habitability of the building, whereas the owner of the property has no ability to submit evidence, (such as expert witness or photographs of the interior of the building), at the hearing since the building has been seized, nor does the owner have the ability to correct any violations as the building has been seized. Since the owner is unable to submit any contrary evidence, the condemnation is always upheld by the hearing officer, who is an ISD employee.

For the owner to regain control of his building, he has to pay the board-up fee, (which is usually about $2,000.00, and assessed by the City even if the building was already secure), and pull any permits that the City requires. But, the City can delay releasing the building without explanation, leaving the owner at the mercy of the City as he frantically tries to regain control of his building. This delay tactic is similar to how the Respondent, for two months, refused to discuss a court ordered stipulation with the Petitioner.

While the United States and Massachusetts Constitutions clearly restricts police powers, the City uses the challenged "padlock law" to augment their enforcement of other laws, such as keeping the peace. An example of this can be found in the Allston/Brighton area of Boston where the City on occasion has housing inspectors accompanying Boston police when patrolling the college section of the City. If a party gets out of hand, the Inspectional Service Department just condemns and seizes the building, as they did with the fraternity house at 49 Gardner Street.

Another example of the City seizing and condemning buildings for purposes other than a violation of the Massachusetts Sanitary Code occurred when the building at 124 King Street was condemned and boarded-up by the City. The boarded-up and seizure was in response to an allegation by ISD Inspector Murray, who claimed that he was assaulted while inspecting the building.[3]

In addition, the policy of the City seizing buildings, which are found uninhabitable/ condemned pursuant to 105 CMR 410.831 of the Sanitary Code, has been cited in numerous complaints filed in the Massachusetts District Court. The seizure of these buildings varied from two weeks to beyond a year.

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[3] The individual accused of assaulting ISD Inspector Murray was later found not guilty.

On December 17, 2000 the owners of 534 Dorchester Avenue filed a suit against the City, (*Clancy v. City of Boston*, District Court Civil No. 01cv10263-RCL). Their complaint included the allegation that the City denied them access to their building, after it was found to be uninhabitable, by posting a police detail "which prevented individuals from entering the premises". In response, the City "deny the characterization of the purpose for the police detail ... [but] admit a police detail was assigned to the building to prevent unauthorized entry". (The City did not further clarify who was "authorized" to enter the building, nor did they indicate what statute or law gave the City the right to make that decision.) In the decision of the Court, the Judge concluded a "police detail was subsequently stationed outside the property denying all access to the premises".

Another claim filed in the District Court, *Bogan v. City of Boston*, (Civil No. 02cv10522-RCL), Albertha Bogan, the owner of 41 Stanwood Street, alleged that the City upon finding numerous alleged violations of the Massachusetts Sanitary Code, immediately condemned the building, giving the occupants twenty minutes to gather belongings and leave before boarding-up Bogan's building. Plaintiff Bogan further explained that she was deprived use of her building for approximately two weeks.

The deposition of Kevin Joyce, who was then Commissioner of the City's Inspectional Services Department, indicates on page 97 that a property owner would have to "call 1010 [Massachusetts Avenue][4] and get access to [the boarded building]", and that the City "spends a lot of time letting people back in [their building] to get their stuff out [of their building]".[5] But, page 99 of the same deposition indicates that Bogan's lawyer sent a letter to Inspector Scott indicating "she's been denied access to her home".

In still another case filed in the District Court, *Zahlaway v. City of Boston*, (Civil No. 07cv12253-RCL), Plaintiff Zahlaway alleged that the City boarded up his buildings located at 17 Kinross and 77 Chiswick Road, and then forbade anyone to enter while the condemnation was in effect.

In yet another case filed in the District Court, *Dickey v. Kennedy*, (Civil No. 07cv11717-

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[4] 1010 Massachusetts Avenue is the location of the City's Inspectional Service Department. Joyce's statement is similar to the relief the Petitioner received from Suffolk Superior Court, which granted him access to his building Monday thru Friday, 9am to 5pm; but the Petitioner still had to call ISD, who then would send an ISD employee to remove the plywood from a doorway, thus allowing the Petitioner access to his building that day until 5pm.

[5] Since the City allows "people" to enter the boarded-up buildings, said buildings could not be a hazard to enter.

NMG), Plaintiff Dickey[6] alleged that the City boarded-up his building at 97 Mt Ida Road for the purpose of denying him access, which created an abandoned building, (the City seized/denied Dickey any access to the building for two months). Inspector Kennedy relayed to Plaintiff Dickey that if he entered the building while it was boarded-up that Dickey would be arrested for trespassing. At the condemnation hearing for 97 Mt Ida, Plaintiff Dickey asked Inspector Kennedy what had to be done to gain access to the building, but Inspector Kennedy refused to discuss the seizure with Dickey.

While the Respondent has declined to explain their legal justification of the automatic seizure/control/taking of the Petition's buildings,[7] the challenged "padlock law" has been further explained in another case filed in the District Court. In *Clancy v. Inspectional Services Department of the City of Boston*, (Civil Action No. 2001cv10263-RCL), on August 11th, 2000 the City found uninhabitable/condemned the Clancy's property. Over a year later, the lawyer for the City decided to view the Clancy's property, which was still condemned and boarded. On April 4, 2002, inspectors from Inspectional Services removed the plywood covering the front door and accompanied counsel on a walk-through of the

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[6] Plaintiff Dickey is also the Petitioner in case at bar.

[7] In the instant case, the Respondent's motion for summary judgment was granted prior to discovery.

building. Clancy's attorney then filed a Motion for the Imposition of Sanctions for Violation of Federal Rules of Civil Procedure, citing that the City violated the provisions of Rule 34, which allows for the inspection of premises under the control of an opposing party.

In response to the Motion for Sanctions, the City's attorney asserted that:

> "The defendants did not violate Rule 34 ... [a]s the plaintiff's correctly stated, Rule 34 requires that a party requests permission to inspect property in the control of another. The act of condemnation of the property causes the possessor's and owner's control over the entry and use of the property to cease. The plaintiff owners were aware of this, as demonstrated by both Paul Clancy and Paul Clancy, III in their depositions at which they testified that they sought permits from ISD to re-enter the properties.[8] ... Any subsequent entry and use of the property must be authorized by Inspectional Services. This authority is evident throughout the sections of

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[8] The City's lawyer neglected to mention that the City placed a police detail in front of the Clancy's property when the building was boarded-up, "denying all access".

> the Code of Massachusetts Regulations. *See e.g.* 105 CMR 410.950(B) (mandating occupant and/or possessor obtain written approval by the board of health for subsequent use of a condemned property);[9] 105 CMR 410.950(C) (authorizing the forcible removal of persons refusing to leave a condemned property)."[10]

In further explaining the City's seizure of the Clancy's property, the City's attorney asserted that:

> "This power lies within the implicit police powers of municipalities so to prevent and abate nuisances and preservation of the public health. Mass. Gen Laws ch., 111 §127A and 105 CMR 400.00 *et seq.* The view of

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[9] This statement is a misquote of the Sanitary Code, 105 CMR 410.950(B) which states that "No dwelling ... shall again be used for human habitation until written approval is secured from ... the board of health".

[10] This statement is a misinterpretation of 105 CMR 410.950(C), which states that "If any person refuses to leave a dwelling ... which has been ordered condemned ... [they] may be forcibly removed by the board of health". While the code does not further clarify, one can assume that the person being removed from the dwelling was using the dwelling for habitation since this section further references "105 CMR 410.830 through 410.920" of the Sanitary Code, which discusses dwelling units unfit for human habitation.

> the property taken by counsel for the defendant did not run afoul of the Federal Rules of Procedures. In fact, the requirements of Rule 34 with regard to viewing the property would require the plaintiffs to seek permission from Inspectional Services, as entry is controlled by Inspectional Services as a result of the condemnation."

This absurd interpretation[11] of the Massachusetts Sanitary Code allows the City to take possession of any building, and then deny the owner access to their building for months. And, since the owner does not have access, the building is not repaired or even maintained, as such, the building stays condemned and in the possession of the City because the owner has not repaired the building ...

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[11] While some part of this statement might have been applicable on August 11th, 2000, being the day that the building was condemned, there is no justification as to why after 601 days the owner's access depended on an ISD employee going to the property, (to remove a plywood board), and allow him entry to the building. And, since Inspectional Services is closed evenings and weekends, (per City of Boston's website, ISD's hours of operation are 8:00am to 4:00pm, Monday thru Friday), this requirement restricts the owner's access to the building.

And in the instant case, on May 27, 2008, the Respondent seized two buildings owned by the Petitioner, located at 495 and 497 East Fourth Street, ("Property"). In seizing the buildings, the City boarded-up said buildings by placing plywood over the front and rear doors and all the first floor windows, which denied the owner access to the buildings. The City also posted a four by four foot "City of Boston Project Pride - No Trespassing" sign on both buildings. See *Appendix C*, page 30a.

To regain control/access to the buildings, the Petitioner filed a temporary restraining order against the City in Suffolk Superior Court. By this motion, the Petitioner requested that the Court order the City to refrain from denying him legal access to his building and from entering the building without a valid warrant. In an affidavit filed in support of his motion, the Petitioner stated that the City, by boarding up his buildings, was denying him access to his property. (It is the Petitioner's understanding that he would be arrested for trespassing if he entered his boarded-up building, as he was previously told.) The Petitioner also stated that he was worried that the buildings could sustain substantial damage if the City continued to restrict his access.

On July 2, 2008, at the motion hearing for injunctive relief, the City consented to allow the Petitioner access to his buildings 9:00 a.m. to 5:00 p.m., weekdays. In response to the City's

concession, the Superior Court entered an order which provided in relevant part:

> "The defendant, Boston Inspectional Services Department ("ISD") shall allow the plaintiff, James Dickey ("Dickey"), access to his properties at 495-497 East Fourth Street, South Boston, Massachusetts, Mondays through Fridays between the hours of 9:00 a.m. and 5:00 p.m., upon one hour telephone notice by Dickey to Leo Boucher at ISD ..."

But, because the Petitioner works Mondays through Fridays between the hours of 9:00 a.m. and 5:00 p.m., the injunctive relief granted by the Superior Court still denied the Petitioner access to his buildings; this is evident by the fact that the Petitioner was able to access the buildings only four times during the summer of 2008. Due to the unexplained restricted access imposed by the City, the Petitioner then filed an appeal of the injunctive relief to the single justice of the Massachusetts Appeals Court, which was subsequently denied. The Petitioner then further filed an appeal of the injunctive relief to the single justice of the Massachusetts Supreme Court, which was subsequently denied. The Petitioner then further filed an appeal to the full panel of the Massachusetts Supreme Court, which was also denied.

On September 15, 2008, in the U.S. District Court of Massachusetts, the Petitioner filed a request for injunctive relief in the form of a complaint requesting a temporary and permanent injunction precluding the City from (1) denying the Petitioner access and control over his building; (2) entering the building without a valid warrant or emergency; and (3) seizing buildings from Boston property owners that have been condemned/found uninhabitable pursuant to 410.831 of the Massachusetts Sanitary Code.

On September 18, 2008, Judge Saris ordered that the Petitioner and the Respondent, within a week, enter into a stipulation that would allow the Petitioner access to his buildings both evenings and weekends. But, the Respondent refused to discuss the court ordered stipulation with the Petitioner until November 24, 2008, which is the day the Stipulation was signed. While the Stipulation returned the buildings to the Petitioner, it did not enjoin the City from seizing other building pursuant to the City's absurd interpretation of the Massachusetts Sanitary Code.

The Petitioner then filed a motion for summary judgment to enjoin the City from seizing other buildings pursuant to the challenged "padlock law". The City subsequently filed a cross motion for summary judgment, indicating that their conduct was constitutional, (but without further explaining why the City seized the Petitioner's buildings for six months). The

District Court granted the City's motion for summary judgment, but the Court did not further analyze the constitutionality of the challenged policy, (being the six month seizure of the Petitioner's buildings), by using either strict scrutiny or even rational basis review. The District Court concluded that the record did not support the Petitioner's claim that he was denied adequate access to the Property, which ignores the fact that the Petitioner was not allowed access to the buildings both evenings or weekends for six months.

Reasons for Granting the Petition

As set forth below, this case involves important Fourth, Fifth, and Fourteenth Amendment issues and presents an opportunity for this Court to curtail an unconstitutional "padlock law" implemented by the Respondent through it's interpretation of the Massachusetts Sanitary Code.[12]

The Petitioner's claim/request for injunctive relief, which is enforceable under 42 U.S.C. § 1983, is based on the violation of his right to be secure from unreasonable searches and seizures/ takings and the due process clause. It is the Petitioner's assertion that the Respondent's six

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[12] The City of Boston seized 60 to 100 buildings annually under the challenged "padlock law", per City of Boston's website

month seizure/taking of the Petitioner's buildings is without legal or logical justification and is in violation of the Petition's constitutional rights under the Fourth, Fifth and Fourteenth Amendment Due Process Clause, which requires that deprivation of life, liberty or property be preceded by notice and opportunity for a hearing appropriate to the nature of the case. While notice and hearing for the condemnation have occurred in regards to the Petitioner's buildings, (and other buildings mentioned in this writ), there has been no notice or hearing conducted by the Respondent in regards to the seizure of said buildings. These are two separate issues and the seizure/taking needs to be addressed. While the condemnation of a building restricts the usage of that building, (that being habitation), the condemnation process in no way automatically transfers control of the building to the Respondent.

a. Violation of Fourth Amendment Rights

While the Respondent has not challenged any of the facts at bar, the Respondent stated that "[t]here was no illegal seizure of [the Petitioner's] buildings". But the court ordered Stipulation, signed by both the Petitioner and the City, clearly indicates that the Respondent seized the Property. The Stipulation, which was signed

almost six months after the Petitioner's buildings were seized by the Respondent, states that the City "will transfer responsibility and control of the property to [Petitioner] pursuant to this agreement ... ". And, since the Stipulation indicates that the City is returning control of the building to the Petitioner, the City can not now assert that they never seized nor had control of the Petitioner's building. (Simply stated, the Respondent can only "return" something it has in its possession.)

Judge Dein (correctly) concluded that "in the instant case, ISD's conduct meaningfully interfered with [Petitioner's] possessory interests in the Property. The record demonstrates that ISD's actions in boarding up the building and condemning the Property restricted [Petitioner's] access to the premises. Even after the [Petitioner] obtained relief from the Suffolk Superior Court[13], his access was limited to business hours and he was not able to enter the

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[13] Judge Dein questioned why the Petitioner "agreed" to the Superior Court's order, if it was unworkable to him. But "parties have agreed" is the Court's chose of words, not the Petitioner's in regards to the order issued on July 2, 2008. The "agreement" was reached between the Superior Court and the City, the Petitioner had virtually no input into this "agreement". In fact, at that hearing, the Court told the Petitioner that search warrants were a bother to obtain, as such, ISD should not have to get a search warrant to access the Petitioner's buildings.

dwelling at the Property unless an ISD employee was there to let him in.[14],[15] thus, ISD effectuated a seizure under the Fourth Amendment." *Appendix B*, page 20a.

In her Report and Recommendation, Judge Dein concluded that the boarding-up and taking control of the Petitioner's Property does not constitute an unconstitutional seizure in violation of the Petitioner's rights under the Fourth Amendment.[16] *Appendix B*, page 19a. But, by coming to this conclusion, Judge Dein failed to further analyze the alleged seizure of the Petitioner's Property as to whether the six month long seizure/restricted access was reasonable.

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[14] Please note that the relief granted by Suffolk Superior is similar to Joyce's statement explaining how a property owner gains access to their boarded properties, being that they have to call ISD to have an ISD employee let them into their building.

[15] Judge Dein further questions why the Petitioner did not attempt to modify the Superior Court's order, but, as previously stated, the Petitioner appealed this order to the single justice of the Massachusetts Appeals Court, where it was denied without explanation, then further appealed that decision to the single justice of the Massachusetts Supreme Court, where it was denied without explanation, then further appealed that decision to the full panel of the Massachusetts Supreme Court, which was further denied.

[16] As previously stated, the Petitioner is not questioning the boarding-up of the Property, it is the seizure and denial of right-of-entry that is at issue.

As the City has implemented a custom or practice that interferes with a fundamental right, the Petitioner's possessory right to his property, the lower courts should have subject the Respondent's practice or custom of seizing buildings to 'strict scrutiny'. "A government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subject to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." *Regents of Univ of Cal v. Bakke*, 438 U.S. 265,357 (1978) (Brennan J., concurring in the Judgment and dissenting in part).

It is the Petitioner's assertion that the City's policy of seizing buildings (for months) does not even withstand a "rational basis review". The rational basis review standard requires that governmental action be "rationally related" to a "legitimate" government interest. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Assuming that the objective of the City is to have any violations of the Massachusetts Sanitary Code corrected as quickly as possible, denying the owner access to the uninhabitable/condemned building is not "rationally related".

In the instant case, the City states that the Inspectional Services Department "would be failing to protect the public should they not

monitor the activity at the property". In response to this statement in relation to the practice of seizing/taking/denying right-of entry to buildings, the Petitioner contends that seizing a building does indeed make it quite easy for the City to monitor the activity at a boarded/seized property, as there would be no activity because the owner is denied access to the building. Also, once the property owner pays the $2,000.00 board-up fee, and pulls any permits the City requires to regain possession of their building, the building is still condemned and any legitimate government interest, such as making sure the uninhabitable building is not being used for habitation, (until repaired), would still apply. Again, it is in everyone's best interest to have a condemned building in compliance with the Massachusetts Sanitary Code as quick as possible. Denying and/or restricting owner's access to his property for any amount of time does not accomplish any legitimate government interest.

Judge Dein indicates that a determination of reasonableness must be based upon "a 'careful balancing of governmental and private interests.'" But, neither the Respondent nor Judge Dein explained how denying an owner access to their building furthers any government interest. This approach treats an uninhabitable building as a crime scene, and preserves it forever.

In the Report and Recommendation, Judge Dein concluded that the record does not support the Petitioner's argument that he was denied sufficient access to the Property, by indicating the City was "willing to work" with the Petitioner by allowing him access to his building during weekdays, (9am to 5pm).[17] But, the record presented to the lower court supports the Petitioner's argument that he was denied access sufficient to the Property; as previously stated, the record clearly indicates the Petitioner was able to access his building only on four occasions during the summer of 2008.[18]

In short, the record demonstrated that the City acted irrationally by implementing a policy that endangers the general public. By denying property owners access to their building when condemned/found uninhabitable, the City creates an "abandoned" building for no apparent reason. Once a building is condemned, it lies vacant and boarded-up, which makes it an easy target for arson and trespassers, while the owner frantically tries to figure out how to regain access/control of

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[17] Because the Petitioner has a 9-5 job, the "relief" received from Suffolk Superior Court was of little use.

[18] Judge Dein has not further explained how she concluded "the evidence shows that [Petitioner] was not denied access sufficient to repair the Property". The fact that the Petitioner was able to gain access to his building on only four occasions over a four month period could in no way be considered "sufficient".

his property to maintain/repair the building. This policy is just absurd and needs to be discontinued.

b. Violation of Procedural Due Process

Judge Dein concluded that the Petitioner's procedural due process was not violated due to the City's failure to provide him with separate notice[19] and hearing to address the seizure/denial of right-of-entry of his Property. While Judge Dein further concluded that the Petitioner could have challenged "these actions at the condemnation hearing or in any subsequent appeal";[20] but as stated above, the record before Judge Dein indicated that the Petitioner did attempt to further challenge the seizure/denial of right-of-entry further in the Massachusetts Courts, but without success. Also, Judge Dein neglects to take into consideration that the Petitioner did attend the condemnation hearing

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[19] Judge Dein concluded that the Petitioner was provided with adequate procedural due process in connection with the condemnation, but since the hearing notice was stapled directly behind another page when posted on the building, the Petitioner was unaware of condemnation hearing for the Property.

[20] Please note that both 410.831(B) and (C) clearly indicate that the condemnation hearing is to "determine whether the dwelling or portion thereof is unfit for human habitation". The condemnation hearing as outlined in the Massachusetts Sanitary Code is not intended to further discuss if the building should be seized/taken by the City.

for his building at 97 Mt Ida Road, and at that meeting he asked Inspector Kennedy what had to be done to gain access to 97 Mt Ida, but Inspector Kennedy refused to discuss it with the Petitioner.[21]

While the Hearing Officer for the condemnation of the Property specifically addressed the fact that the dwelling had been boarded-up and secured, she in no way addressed whether the owner of the building should be denied right-of-entry. And, since the Petitioner was not informed by the Respondent as to why the City decided to seize/deny/restrict his right-of-entry to his building for six months, the Petitioner does not have a "decision" that he can challenge in any court. The only legal remedy that the Petitioner knows of is through an injunction, which was filed in the instant case.[22]

Again, it is the Petitioner's assertion that the condemnation of his building for a violation of the Massachusetts Sanitary Code is a separate issue from the six month long seizure/taking/denial of right-of-entry of the building, which still needs to be further explained by the City.

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[21] For two months, the City refused Plaintiff Dickey any access to 97 Mt Ida.

[22] While Judge Dein indicates the Petitioner's request for injunctive relief was denied, Judge Saris had already concluded that the unexplained restricted access was without cause, and ordered that the Respondent and the Petitioner enter into a stipulation allowing the Petitioner access to his buildings evenings and weekends.

In *Mullan v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the United States Supreme Court held:

> "Against this interest of the State, we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean,* 234 U.S. 385,394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. ... An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer,* 311 U.S. 457; *Grannis v. Ordean,* 234 U.S. 385; *Priest v. Las Vegas,* 232 U.S. 604; *Roller v. Holly,* 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra, and cf. Goodrich v. Ferris,* 214 U.S. 71. But if, with due regard for the practicalities and

> peculiarities of the case, these conditions are reasonably met, the constitutional requirements are satisfied"

(*Id. at pages 314-315.*)

And in the instant case, the record clearly indicates that the City never informed the Petitioner of their decision to seize/take/deny right-of-entry of the Petitioner's building for six months. Judge Dein indicates that "assuming control over the Property occurred as part of the condemnation process", (*Appendix B*, at page 17), but the decision to "assume control" of the Property, (and other buildings mentioned in this writ), was not included in any condemnation notice nor further discussed at any condemnation hearing nor even further explained in the instant case. And, as the U.S. Supreme Court has held, the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest" *Mullan v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, at 314-315 (1950). As such, the undisputed facts clearly demonstrate that the Petitioner has been deprived of procedural due process because of lack of notice.

c. Violation of Fifth Amendment Rights.

In the pleadings submitted by the Petitioner in the instant case, the Petitioner went to great

to great lengths to distinguish the actions of the Respondent, which took place on May 27th, 2008 from the actions that took place from May 28th thru November 24th, 2008.[23] But, for unknown reasons, Judge Dein's Report and Recommendation does not acknowledge this distinction.

In regards to the City's actions, below is a further clarification explaining that the policy that the Petitioner is attempting to challenge, (unsuccessfully so far), being that the seizure of condemned buildings is not part of the community caretaking function, but is in fact a "padlock law".

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[23] In Judge Dein's Report and Recommendation, she relies on *Gardner v. McGroarty*, 68 Fed. Appx. 307,312, 2003 WI 21310845, at*4 (3d Cir. Jun.9, 2003), a non-precedent decision which indicates that when "a building is seized because of the danger is poses ... the seizure does not violate the Fourth Amendment", but the "seizure" that took place in that case was the collection of evidence, being the visual observations of the city defendants when they walked-thru the building. The City of Wilkes-Barre never took possession of the building. While *Gardner v. McGroarty* does further reference *Freeman v. City of Dallas*, 242 F.3d 642,651 (5th Cir 2001), the seizure that took place in that case was limited to the actions the City of Dallas took to abate a nuisance. Again, the City of Dallas did not take possession of Freeman's property for months without explanation. Neither of these cases have any impact on the instant case. Cases that have a direct impact on the instant case deal with forfeiture laws, not cases dealing with community caretaking doctrine.

The challenged policy, as it has been implemented by the City, is almost identical to padlock ordinances that other municipalities have implemented to abate illegal activities.[24]

i. Community Caretaking Function (May 27th, 2008)

The actions of the City in regards to the condemnation and boarding of the Petition's building at 495 East Fourth Street, that occurred on May 27, 2008, is not being questioned in the instant case. As the Petitioner indicates in his complaint, "[t]he issue at hand is whether the [Respondent] ... has the legal right to seize[25] the [Petitioner's] building just by condemning the building pursuant to 105 CMR 410.831". The Petitioner further indicates that "there has been

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[24] The main difference between the City's "padlock law" and padlock laws of other municipalities, (besides lack of notice and hearing), is that the City seizes property because of violations of the sanitary code, whereas other padlock laws discussed in this writ abate illegal activities. While the City seizes buildings because of illegal activities, the official explanation for these seizures is due to violations of the sanitary code. Needless to say, padlocking a building that is in violation of the sanitary code does not abate the violation.

[25] The seizure the Petitioner is referring to is the Webster definition of this word: "taking possession of person or property".

no notice of hearing conducted by the [Respondent] in regards to the seizure of the [Petitioner's] property", and it is the seizure/taking possession of the Property that needs to be "addressed".

The Petitioner is in no way questioning the City's actions/authority under the community caretaking doctrine, which gives the City "broad authority to take immediate action to render aid, assess and respond to situations posing an imminent serious threat to life or property, and otherwise protect the public health and safety from imminent harm." *Mincey v. Arizona,* 437 US 385 (1978), quoting Kurt Schwartz's memorandum *"Police Powers During Public Emergencies",* page 3, (2003). But, these "actions must be limited to rendering emergency assistance, (*Mincey v. Arizona*, 437 U.S. 385 (1978)), and the [City] must withdraw once the emergency has abated. *Michigan v. Clifford,* 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 US 499 (1978)." *Id*, page 4-5.

Under the community caretaking doctrine, in an emergency situation, the City has the authority to board-up an unsafe building. But, once the emergency has been abated, (which the board-up should accomplish), the City then has to withdraw. *Id.* And, in the instant case, the actions of the City on May 27th, 2008 could be perceived as abating an "emergency" at the

Property[26], but the City has yet to explain why they did not then "withdraw", but instead took possession of the building for six months.

ii. Padlock Policy (May 28th thru November 24th,2008)[27]

The policy that the Petitioner is attempting to challenge is the automatic transfer of possession and right-of-entry to the Respondent when a building is found uninhabitable/ condemned pursuant to 105 CMR 410.831, without any hearing or notice in regards to transfer of possession. As Judge Dein indicates in her Report and Recommendation, "[i]t is undisputed that ISD's challenged conduct in boarding up and assuming control over the Property occurred as part of its ordinary custom and practice with respect to condemnation proceedings. The City has not indicated that ISD intends to abandon this practice or to provide further notice and opportunities for property owners to be heard with respect to this practice."

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[26] While the Respondent asserted that the Property was a hazard by being open to the public, the record clearly indicates otherwise as entry to the Property was accomplished by a locksmith, and the dangerous "wildlife" that was removed from the Property, (to protect the public!?), was the Petitioner's nine month old kitten.

[27] November 24th, 2008, being the day the Petitioner and Respondent signed the Stipulation, which returned control of the building to the Respondent.

Appendix B, page 16a, (emphasis added). Under this policy, once the City takes possession of a building, the City is under no obligation to allow the property owner entry of the seized building, and usually restricts any access of the building to ISD business hours.[28] This restricted access can continue for months, with no explanation.

The policy, as implemented by the City, is almost identical to padlock ordinances that other municipalities have implemented to combat illegal activities. One example is New York City's "Police Padlock Law", (New York City Administrative Code Chapter 7, Nuisance Abatement Law), which was designed to shut-down illegal activities such as prostitution and drug dealing. New York City's padlock law allows the City's corporate counsel to bring a civil proceeding in the Supreme Court to preliminary and permanently enjoin a public nuisance. *New York City Administrative Code* 7-706(a). The relief granted thru a permanent injunction can include a closing of the nuisance building for a period no more than one year from the posting of the judgment. *NYC Admin Code* 7-714(c).

While other municipalities have implemented padlock ordinances/laws which

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[28] Per City's website, the business hours for Inspectional Service Department are Monday thru Friday, 8:00am to 4:00pm.

appear to comply with constitutional rights, (to the horror of property owners throughout the country), some of these laws have been successfully challenged in other court cases. In *First English Evangelical Lutheran Church v. County of Los Angeles*, (482 U.S. 304,318 (1987)), the U.S. Supreme Court held that a "[t]emporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation", the challenged padlock laws are viewed as a forfeiture law by the courts, and thus subject to a "Lucas Analysis"[29].

"The United States Supreme Court has held in a long line of cases that the State may use its police power to enjoin a property owner from activities akin to public nuisances without offending either the Due Process Clause or Takings Clause. These cases were reviewed and clarified in *Lucas*. "'[L]and use regulation does not effect a taking [under the federal Constitution] if it "substantially advance[s] legitimate state interests" ***.'" *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003,] at 1024, 112 S.Ct. at 2897, 120 L.Ed.2d at 818 (citing *Nollan v. California Coastal Comm.*[1987], 483 U.S. 825, 834, 107 S.Ct. 3141,3147, 97 L.Ed.2d 677,687)." quoting *State ex rel. Pizza v. Rezcallah* (1998), 84

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[29] See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 for further discussion of this analysis.

Ohio St.3d 116, 702 N.E.2d 81 (Ohio 1998), (emphasis added).

One case that successfully challenged a padlock law using the *Lucas* decision is *Pizza v. Rezcallah,* (84 Ohio St.3d 116).[30] In *Pizza v. Rezcallah,* the "state argue[d] that the mandatory closure and bonding provisions of [Ohio's Revised. Code] 3767.06(A)[, being Ohio's padlock law,] advance the state's interest in protecting the public from illegal drug activity by providing incentive to a property owners to actively monitor their property, and to prevent the recurrence of felony drug transactions on their property. There is no question that the prevention of illegal drug activity is a legitimate state interest. [But the Ohio Supreme Court held], that the mandatory closure provisions of R.C. 3767.06(A) do not substantially advance this interest when imposed against property owners who have not acquiesced to or participated in the illegal activity, and who have promptly abated the nuisance upon its discovery." *Id.*

In *Pizza v. Rezcallah*, similar to the instant case[31], "the trial court issued a temporary

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[30] For a further discussion of a Padlock Law in relation to Constitutional rights, please also see *Keshbro v. City of Miami,* 801 So 2d 864 (Fla. 2001)

[31] *Pizza v. Rezcallah* is similar in that the property was seized before a hearing occurred, but please note that the Respondent has never held a hearing in regards to the seizure/taking of the Petitioner's buildings.

restraining order allowing the police to padlock Rezcallah's property prior to any hearing on either the preliminary or permanent injunction. Though the issue was not directly raised on appeal, [the Ohio Supreme Court] note ... [their] concern with any prehearing padlocking of premises absent a showing of exigent circumstances.[32] The United States Supreme Court has held that seizure of real property based on illegal drug activity is not an extraordinary circumstance justifying postponement of notice and hearing. 'Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.' *United States v. James Daniel Good Real Property* (1993), 510 U.S. 43,62, 114 S.Ct. 492,505, 126 L.Ed.2d 490, 508-509." quoting *State ex rel. Pizza v. Rezcallah,* (1998), at footnote no. 1., 84 Ohio St.3d 116, 702 N.E.2d 81 (Ohio 1998).

In *United States v. James Daniel Good Real Property*, the U.S. Supreme Court held that: "The Due Process Clause of the Fifth Amendment guarantees that '[n]o person shall ... be deprived

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[32] In the instant case, after entering the Property the Boston police requested ISD perform a "general" inspection, not an "emergency" inspection of the Property. This is a clear indication that no exigent circumstances existed at the Property when the City seized the Petitioner's buildings.

of life, liberty, or property, without due process of law.' Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property. See *United States* v. *$8,850*, 461 U.S. 555,562, n.12 (1983); *Fuentes* v. *Shevin*, 407 U.S. 67,82 (1972); *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U.S. 337,342 (1969) (Harlan, J., concurring); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)." *United States v. James Daniel Good Real Property* (1993) 510 U.S. 43.

"Here the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself. Our cases establish that government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments". *Id.*, (emphasis added).

"Though the Fourth Amendment places limits on the Government's power to seize property for purposes of forfeiture, it does not provide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings. So even assuming that the Fourth Amendment were satisfied in this case, it remains for us to determine whether the seizure complied with our well settled jurisprudence under the Due Process Clause. We tolerate some exceptions to the general rule

requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" *Id.*, at 82 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371,379 (1971)). "To establish exigent circumstances, the Government must show that less restrictive measures--*i.e.*, a *lis pendens*, restraining order, or bond--would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property. ... [N]o showing of exigent circumstances has been made in this case, and we affirm ... that the *ex parte* seizure of ... real property violate[s] due process." *Id.*

And, as previously discussed, an exigent circumstance under the community caretaking doctrine is a situation posing an "imminent serious threat to life or property, and otherwise protect the public health and safety from imminent harm." *Mincey v. Arizona,* 437 US 385 (1978), quoting Kurt Schwartz's memorandum on *"Police Powers During Public Emergencies"*, page 3, (2003). And, as in the instant case, since the actions of the City on May 27th, 2008 should have abated any perceived "threat" at 495 East Fourth Street, there are no exigent circumstances that explain the City's seizure of the Petitioner's buildings for six months, (being May 28th thru November 24th).

In *Pizza v. Rezcallah*, the Ohio Supreme Court further concluded that "[a]n additional effect of padlocking the property is that the owner is precluded from maintaining or repairing the property after the offending party has left the premises. This creates an increased risk that the property will further deteriorate and again become a nuisance. These effects and considerations undercut the state's argument that the mandatory closure provision of R.C. 3767.06(A) substantially furthers the goal of prevention and speedy abatement of nuisances. ... [The Court further] conclude[d] that the imposition of a closure order pursuant to R.C. 3767.06(A) effectively closing real property against its use for any purpose for a period of one year does not advance a legitimate state interest when enforced against an innocent owner and that the state's interest does not outweigh the owner's interest in the economic use of his or her property. Therefore, the mandatory closure order provisions of R.C. 3767.06(A) violate the Takings Clause of the Fifth Amendment to the United States Constitution when imposed against an innocent owner. Further, ... [the court] h[e]ld that because there is no intentional wrongdoing ... forfeiture under these circumstances is so arbitrary and oppressive as to be a taking without due process of law in violation of the Fourteenth Amendment to the United States Constitution." *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 702 N.E.2d 81 (Ohio 1998).

d. **The Respondent Implemented a Custom or Practice that is in direct conflict with the Massachusetts Sanitary Code.**

Furthermore, the "padlock law" that the Respondent has implemented is in direct conflict with Massachusetts Law, which requires most violations be completed/corrected within 24 hours. *Massachusetts Sanitary Code* 410.830(A).

"Massachusetts grants regulatory authority to municipalities via the Home Rule Amendment ("Amendment"), Mass. Const. amend. art. II, §§ 1-9 (as amended by Mass. Const. amend. article LXXXIX). The Amendment provides municipalities with broad regulatory power:

> It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article.

Mass. Const. amend. art. II, § 1.

The Amendment empowers cities and towns to enact local ordinances that do not conflict with the general laws of Massachusetts. *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 741 N.E.2d 37,43 (Mass. 2001). The substance of the Amendment is rooted in Mass. Const. amend. art. II, § 6:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by [Const. amend. art. II, § 8], and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to [Const. amend. art. II, § 3].

Massachusetts General Laws ch. 43B, § 13, which defines the parameters of a municipality's powers, is virtually identical in substance to Mass. Const. amend. article. II, § 6.

Under the Amendment, municipal actions are presumed valid, and municipalities may

undertake any action that is not inconsistent with state law. *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999). The Massachusetts Supreme Judicial Court has set forth the following guidelines for determining whether a municipal ordinance is inconsistent with state law:

> If there is an express legislative intent to forbid local activity on the same subject, state law preempts local law;
>
> If the local regulation would frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject, state law preempts local law. Courts may infer that the Legislature intended to preempt the field of regulation if legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose; or
>
> State law preempts local law if there is a "sharp conflict" between the state legislation and the local law, which happens when the legislative intent to preclude local action is clear or the purpose of the statute cannot be achieved in the face of the local law.

Id. at 337-38."

The clear conflict that exists between the City's "padlock law" and the Massachusetts laws is that 410.830 of the Massachusetts Sanitary Code requires that "the owner or occupant to make a good faith effort to correct" any violation listed under 410.830(A) "within 24 hours". *Massachusetts Sanitary Code*, 410.830(A). But, since the owner is denied access to his property under the challenged "padlock law", he is unable to comply with any correction orders he would receive. As such, the City's policy is inconsistent with certain provisions of State law and for that reason violates the Home Rule Amendment, Article 89, § 6, of the Amendments to the Massachusetts Constitution, and G. L. c. 43B, § 13., and is thus invalid.

Conclusion

The "padlock law" that the Respondent implemented is in direct violation with the Petitioner's constitutional rights under the Fourth Amendment, Fifth Amendment, the Fourteenth Amendment Due Process Clause, and also is in direct conflict with Massachusetts State Law. In the instant case, any actions by the Respondent in context to the community caretaking doctrine would have occurred on May 27th, 2008, the Respondent has yet to explain why they then seized the Petitioner's Property for six months. While the lower court had concluded that the Respondent's actions were justified due

to the alleged condition of the Property, it is the Petitioner's assertion that the alleged condition of the Property is irrelevant to the instant case since the Property was not a hazard to enter, (the fact that the Petitioner was granted "visitation rights" is a clear indication that the building was not a hazard to enter);[33] nor has the City alleged that any said building was a hazard to enter. There is no legal or logical justification for the Respondent's actions.

Furthermore, the Petitioner attributes Judge Dein's attempt to justify the Respondent's actions as the product of wishful thinking,[34] and

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[33] The injunction relief from Suffolk Superior allowed the Petitioner access to his building weekdays 9:00am to 5:00pm.

[34] The wishful thinking that the Petitioner is referring to is Judge Dein's belief that "ISD was willing to work with [Petitioner] so that he could cure the violations at the Property" and that "ISD acted reasonably in order to protect the general public". But, it is the property owners that need protection from ISD. To further explain, the Petitioner's two building were seized after he filed an extortion claim against an ISD employee; 124 King Street was seized after an alleged assault of an ISD employee occurred at that buildings, (the alleged assailant was later found not guilty); the owner of 41 Stanwood Street alleged that the City seized her building because she refused to sell the building to the City, (the building was later sold to the City); and the owners of 97 Mt Ida Road, 17 Kinross Street and 77 Chiswick Road alleged that ISD employee's were attempting to extort their buildings, they later filed RICO claims against ISD employees.

is not based on either appropriate case law or on the record that was presented to the District Court[35]. (But, the Petitioner does agree with Judge Dein in respect that the City should be working with property owners in regards to their buildings, and not trying to take their property away from them.)

If the City wants to implement a "padlock law", they should follow the lead of other cities and create an ordinance for that purpose, instead the Respondent hi-jacked the Massachusetts Sanitary Code to implement an unconstitutional "padlock law". The U.S. Supreme Court has specifically addresses this type of conduct in *Yates v. Milwaukee*, and held that "[t]he question of nuisance ... must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a city declare any particular business or structure a nuisance in such a summary mode and enforce its decision at

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[35] In the instant case, the Petitioner submitted over 50 exhibits/affidavits/depositions confirming/verifying the facts presented to the District and again to the Appeals Court, none of which were disputed by the Respondent. While these same facts are again being presented to this Court in the Petition for Writ, the Petitioner has not included the exhibits along with this writ since the lower court concluded that the "undisputed facts indicate that ISD ... engage[d] in the challenged conduct". *Appendix B*, page 17a.

its own pleasure." *Yates v. Milwaukee*, 77 U.S. 498 (1870).

For all of the reasons discussed above, the Petitioner now requests that this Honorable Court grants his petition for writ of certiorari.

Respectfully submitted,

James Dickey, pro se
10 NewBridge Road
Sudbury, MA 01776
617.416.8241

Appendix A

United States Court of Appeals
For the First Circuit

No. 09-2280

James Dickey,
Plaintiff Appellant,

v.

Inspectional Service Department of the
City of Boston
Defendfant,Appellee

Before
Lynch, Chief Judge
Boudin and Stahl, Circuit Judges

JUDGMENT
Entered: March 1, 2010

Plaintiff James Dickey appeals from the grant of summary judgment to defendant on his 42 U.S.C. 1983 claim against the Inspectional Services Department of the City of Boston. Applying de novo review, we affirm, essentially for the reasons stated in the Magistrate Judge's Report and Recommendations issued July 7, 2009 and adopted by the district court on July 30, 2009.

The judgment of the district court is affirmed.

By the Court:
/s/ Margaret Carter, Clerk

cc:
James Dickey
Alexandra B. Alland

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAMES DICKEY,
Plaintiff,

v.

INSPECTIONAL SERVICES DEPT
of the CITY OF BOSTON,
Defendant.

CIVIL ACTION
NO. 08-11569-PBS

7/30/09 Judge Patti B. Saris: Electronic ORDER entered. ORDER ON REPORT AND RECOMMENDATIONS for 39 Report and Recommendations re 25 Motion for Summary Judgment filed by James Dickey, 35 Motion for Summary Judgment filed by Inspectional Services Department of the City of Boston, 30 Motion to Dismiss filed by Inspectional Services Department of the City of Boston." After a review of the objections, I adopt the report and recommendation of the Magistrate Judge and order that Plaintiff's Motion for Summary Judgment be denied and the Defendant's allowed." (Patch, Christine) (Entered: 07/31/2009)

REPORT AND RECOMMENDATION ON MOTIONS REGARDING DISMISSAL AND ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

July 7, 2009
DEIN, U.S.M.J.

I. INTRODUCTION

The plaintiff, James Dickey ("Dickey"), is the owner of a multi-family house located at 495-497 East Fourth Street in South Boston, Massachusetts (the "Property"). He has brought this action pro se against the Inspectional Services Department of the City of Boston ("ISD" or "City"),[1] pursuant to 42 U.S.C. § 1983, for violations of his constitutional rights. Specifically, Dickey claims that ISD's actions in boarding up and taking control of his Property in connection with condemnation proceedings under the Massachusetts Sanitary Code constituted an unconstitutional seizure. He further claims that ISD's failure to provide him with notice and an opportunity for a hearing with respect to the alleged seizure, separate and apart from the hearing on the condemnation of the Property,

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[1] The Inspectional Services Department is considered a department of the City of Boston rather than an independent legal entity. See Stratton v. City of Boston, 731 F. Supp. 42, 46-47 (D. Mass. 1989) (claims against city department are claims against the municipality). Accordingly, this court construes Dickey's claims against ISD as claims against the City of Boston.

violated his right to procedural due process. (Compl. (Docket No. 1) at Count 1). As relief, Dickey is seeking a permanent injunction precluding the defendant from denying him access to and control over the Property, entering the Property without a valid warrant or emergency, and seizing from Boston property owners buildings that have been condemned pursuant to the State Sanitary Code.[2]

Presently before the court are (1) "Plaintiff James Dickey's Motion in Opposition of Dismissal of Complaint" (Docket No. 14); (2) "Plaintiff's, James Dickey, Motion for Summary Judgment" (Docket No. 25); (3) "Defendant, City of Boston's Motion to Dismiss Plaintiff's Complaint" (Docket No. 30); and (4) the "City of Boston's Motion for Summary Judgment" (Docket No. 35). Because the motions concerning dismissal have been effectively subsumed by the cross-motions for summary judgment, and the parties are seeking to have the issues addressed in light of the evidentiary record, this court has considered all of the arguments set forth by the parties in their briefs as part of the summary judgment record and has analyzed the record pursuant to Fed. R. Civ. P. 56.

Accordingly, this court recommends to the District Judge to whom this case is assigned that Dickey's motion in opposition to dismissal and the

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[2] This court denied Dickey's earlier motion for a preliminary injunction. (See Docket entry dated 12/16/08).

City's motion to dismiss be DENIED AS MOOT. With respect to the parties' cross-motions for summary judgment, this court finds that there are no genuine issues of material fact, and that the City is entitled to judgment as a matter of law. Accordingly, and for all of the reasons detailed herein, this court recommends to the District Judge to whom this case is assigned that the plaintiff's motion for summary judgment be DENIED and that the City's motion for summary judgment be ALLOWED.

II. STATEMENT OF FACTS[3]

The following material facts are undisputed unless otherwise indicated.

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[3] The facts are derived from (1) the "Plaintiffs, James Dickey, Statement of Undisputed Facts" (Docket No. 29) ("PF"); (2) the exhibits contained in the Appendix submitted in support of the plaintiff's motion for summary judgment (Docket No. 28) ("Pl. Ex. __"); (3) the City's statement of facts pursuant to Local Rule 56.1 (Docket No. 37) ("DF") and the exhibits attached thereto ("Def. Ex. __"); (4) the "Plaintiff's Response to Defendants Statement of Material Facts in Support of Their Motion for Summary Judgment" (Docket No. 38) ("PR"); (5) the exhibits contained in the Appendix submitted in support of the plaintiff's "Motion in Opposition of Dismissal" (Docket No. 16) ("Pl. Supp. Ex. __"); and (5) the exhibits contained in the Appendix submitted in support of the plaintiff's opposition to the City's motion to dismiss (Docket No. 34) ("Pl. 2d Supp. Ex. __")

Alleged Conditions at the Property

Dickey is the owner of Property located at 495-497 East Fourth Street in South Boston, Massachusetts. (DF ¶ 1). A multi-family dwelling located on the Property is unoccupied. (DF ¶ 2). On about May 21, 2008, NSTAR Gas & Electric ("NSTAR") applied for an administrative search warrant in order to inspect and remove the electric meter from the dwelling. (DF ¶ 5; Def. Ex. A). According to NSTAR's representative, prior efforts to obtain access to and inspect the gas meter had been unsuccessful because there had been no answer at the Property and the building had been locked. (Def. Ex. A). NSTAR left notices at the Property informing Dickey of its intention to seek a warrant. (Id.). On May 27, 2008, the Boston Municipal Court, South Boston Division issued an administrative warrant authorizing NSTAR to inspect and, if required, remove the electric meter from the Property. (DF ¶ 5; Def. Ex. B). On that same day, NSTAR and an officer from the Boston Police Department entered the Property pursuant to the warrant. (DF ¶ 6; Def. Ex. C). According to an incident report prepared by a police officer who was called to the premises during the inspection, the following events occurred at the Property:

> About 1050 Officer Rackauskas in the F421D unit responded to a R/C to investigate a premise. Upon arrival Officer was met by the F908 Sgt Gaughan and detail Officer Brian Griffiths. Detail Officer Griffiths was performing NSTAR shut off warrants and

> when they came upon 497 and 495 E 4th St they found the buildings in unlivable conditions. NSTAR employee Joe Oliva ..., Constable Minor and Officer Griffiths enter[ed] 497 E 4th as the front door was open. A locksmith changed the lock on 495 E 4th St. Upon seeing the condition of the property they called for patrol supervisor and an Inspectional Services building inspector as well as animal control as the[re] were many stray cats in the buildings. They also shut off power to the buildings. Building inspector Neil Sullivan arrived and declared the buildings unsuitable for living conditions. He then notified the Housing Department. Animal Control Officer DanielGillis arrived and removed a cat. The doors to both buildings were secured as they were found by NSTAR. Both buildings were vacant at this time. Officers spoke to neighbors who stated that no one lives in either building and that the owner, James Dickey comes by once in a while. Housing Department to come by and make the final decision to condem[n] the properties.

(Def. Ex. C).

ISD's Condemnation of the Property

Subsequently, a Housing Inspector from ISD conducted an inspection of the Property and found it to be in violation of the Massachusetts Sanitary Code, 105 C.M.R. § 410. (Def. Ex. D). The Housing Inspector found, among other things,

numerous stray animals, flammable liquids, exposed electrical wires, trash and debris throughout the building, cat feces, and missing sections of ceilings and walls. (Id.). Based on these conditions, ISD determined that the Property was unfit for human habitation, boarded up the building, and issued an emergency order to Dickey, pursuant to its authority under Chap. 1 Sec. 400.200B of the Sanitary Code, by posting the order at the Property.[4] (Def. Ex. D; PF ¶ 3; DF ¶ 8; PR ¶ 8). The order contained a list of the alleged emergency conditions and violations of the Sanitary Code, informed Dickey that the dwelling had been deemed to be unfit for human habitation, and notified Dickey that a condemnation hearing would take place on June 3, 2008 at the Housing Division of ISD. (Def. Ex. D). A condemnation hearing was held on June 3, 2008 as scheduled, but Dickey did not appear. (DF ¶¶ 9, 11; PR ¶ 11). At the hearing, the Housing Inspector presented testimony and introduced evidence regarding conditions at the Property. (Def. Ex. E). He also testified that the

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[4] Section 400.200(B) of the State Sanitary Code provides in relevant part as follows: "Whenever an emergency exists in which the interest of protecting the public health requires that ordinary procedures be dispensed with, the board of health or its authorized agent ... may, without notice or hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to meet the emergency." 105 C.M.R. § 400.200(B).

building at the Property had been boarded up and that it would need to remain secured and locked until the Sanitary Code violations had been corrected by the owner. (Id. at 2-3). The Hearing Officer confirmed that the building would remain boarded up until then. (Id. at 3). Following the hearing, the Hearing Officer issued a Notice of Decision in which she upheld the condemnation of the Property and found the dwelling to be unfit for human habitation and dangerous to the general public. (Def. Ex. F). She also stated that the condemnation could be lifted if the Property owner complied with certain specified conditions, including among others, bringing the Property into compliance with applicable codes, demonstrating to ISD that necessary repairs had been made, and compensating the City for all costs incurred with respect to the Property. (Id.). Such costs included a charge of $1,686.10 for boarding up the building on the Property. (PF ¶ 8). Nothing in the Notice of Decision specifically informed Dickey as to how he could obtain access to or control of the building in order to correct the violations. (See PF ¶ 9; Def. Ex. F). It did provide that "[a]ny person aggrieved by the final decision of the board of health with respect to any order issued under the provisions of [the State Sanitary Code] may seek relief from any court of competent jurisdiction, as provided by the laws of this Commonwealth." (Def. Ex. F).

State Court Proceedings

Subsequently, Dickey filed an appeal of the condemnation decision in state court. (See Pl. Ex.

D-2 at Affidavit ¶ 6). However, due to his concern that the appeal could take several months, on June 20, 2008, Dickey separately filed a motion for a temporary restraining order against ISD in Suffolk Superior Court. (Pl. Ex. D-2). By his motion, Dickey requested that the court order ISD to refrain from denying him legal access to the Property and from entering the dwelling at the Property without a valid warrant. (Id.). In an affidavit filed in support of his motion, Dickey stated that ISD, by boarding up his building, was denying him access to the Property. (Id. at Affidavit ¶ 3). He also stated that he was afraid that the Property could sustain substantial damage if ISD continued to restrict his access. (See id. at Affidavit ¶ 7). Dickey and ISD were able to reach an agreement regarding Dickey's claim for injunctive relief, and on July 2, 2008, the Superior Court approved the agreement and entered it as an order of the court. (Pl. Ex. D-1). The order provided in relevant part:

> The defendant, Boston Inspectional Services Department ("ISD") shall allow the plaintiff, James Dickey ("Dickey"), access to his properties at 495-497 East Fourth Street, South Boston, Massachusetts, Mondays through Fridaysbetween the hours of 9:00 a.m. and 5:00 p.m., upon one hour telephone notice by Dickey to Leo Boucher at ISD ... Should Boucher fail to answer or respond to Dickey's telephone notice, Dickey may return to court for a further order.

(Id.). It also provided that ISD would not enter the Property, except upon a recognized emergency, without first giving Dickey 24 hours written notice of its intent to do so and the purpose of its intended visit. (Id.). Dickey complains that the Superior Court's order denied him access to the Property on weekends and evenings. (PF ¶ 5). However, he does not explain why he agreed to such terms if they were unworkable for him. Moreover, there is nothing in the record indicating that Dickey sought modification of the order in state court. Although the order provided Dickey with access to the Property, ISD continued to maintain control over the premises. Thus, Dickey was required to notify Mr. Boucher of his desire to access the Property so that an ISD employee could accompany him to the Property and let him into the building. (PF ¶ 6). Dickey was not permitted to access the building on his own while the Property remained condemned. (PF ¶ 7; see also Def. Ex. F (listing conditions that Dickey needed to fulfill in order to lift condemnation)).

ISD's Alleged Custom and Practice of Seizing Buildings

It is undisputed that ISD provided Dickey with proper notice and a hearing with respect to the condemnation the Property and that Dickey had an opportunity to challenge ISD's conduct in state court. However, Dickey contends that ISD's

actions in initially boarding up and assuming control over his Property, without providing separate notice and an opportunity to be heard, constituted an unconstitutional seizure of his Property and a denial of his right to due process. (See Pl. Mem. (Docket No. 27) at 2; Compl. ¶¶ 6-7, 10-12). Dickey further contends that the alleged seizure of his Property occurred pursuant to the City's "custom or practice of seizing buildings, that the City condemns pursuant to the State Sanitary Code, without hearing or notice to the property owner." (See PF ¶ 23). In support of his assertion that ISD was acting pursuant to a custom or practice, Dickey has presented evidence of other instances in which ISD boarded up and took control of private property. (See, e.g., PF ¶¶ 2, 19-20 (describing City's action in boarding up and restricting plaintiff's access to his property at 97 Mt. Ida in Dorchester for two months); PF ¶ 17; Pl. Exs. K-1 through K-6 (describing ISD's actions in boarding up and restricting property owner's access to two buildings in connection with condemnation process)).[5] The City has not attempted to dispute this evidence. Nor does it seriously dispute that ISD's actions with respect

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[5] Dickey argues that ISD's practices enable its employees to confiscate properties for their own personal gain. (See Pl. Mem. in Opp. of Dismissal (Docket No. 15) at 5-6). However, the cross-motions for summary judgment are limited to the constitutionality of ISD's alleged practice of boarding up and assuming control over the Property without providing notice and an opportunity for a hearing separate and apart from the condemnation hearing.

to the plaintiff's Property occurred pursuant to a custom or practice.[6] However, as detailed below, the City disputes that its conduct constituted an unconstitutional seizure or that Dickey was denied due process.

The Parties' Agreement Regarding Access to the Property

Dickey initiated the present action on September 15, 2008. On November 25, 2008, the parties entered into a Stipulation of Parties ("Stipulation"), which provides Dickey with unconditional access to the Property. (DF ¶ 12). Pursuant to the Stipulation, Dickey has agreed to clean, repair and winterize the Property in accordance with the State Building and Sanitary Codes, and ISD has agreed to transfer responsibility and control of the Property to Dickey after the plaintiff has obtained the building permit required to perform the work. (Stipulation (Docket No. 22) ¶¶ 1-4). The parties have also agreed that the defendant will not lift the condemnation order on the Property until Dickey has fully satisfied the terms and conditions set forth in the Hearing Officer's Notice of Decision. (Id. ¶ 5).

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[6] While the City argues that the evidence presented by Dickey in order to establish a custom or practice is "false and misleading and do[es] not establish a custom, policy or practice of the City in violation of his civil rights" (see Def. Mem. (Docket No. 36) at 5), the underlying facts about the standard procedures followed by ISD are not in dispute.

Additional factual details relevant to this court's analysis are described below.

IV. ANALYSIS

A. Summary Judgment Standard of Review

Each of the parties has moved for summary judgment with respect to Dickey's claims. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)). A genuine issue is "one that must be decided at trial because the evidence, viewed in the light most flattering to the nonmovant . . . would permit a rational fact finder to resolve the issue in favor of either party." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990) (internal citations omitted). A material fact is one which has the "potential to affect the outcome of the suit under the applicable law." Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996) (internal citations and quotation omitted). In order to defeat the entry of summary judgment, the nonmoving party must submit "sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing

versions of the truth at trial." LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993) (internal citations and quotations omitted), cert. denied, 511 U.S. 1018, 114 S. Ct. 1398, 128 L. Ed. 2d 72 (1994). However, the court will not consider "conclusory allegations, improbable inferences, and unsupported speculation." Galloza v. Foy, 389 F.3d 26, 28 (1st Cir. 2004) (citation omitted). "Cross-motions for summary judgment do not alter the basic Rule 56 standard, but rather simply require [the court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Adria Int'l Group, Inc. v. Ferre Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001). "When facing cross-motions for summary judgment, a court must rule on each motion independently, deciding in each instance whether the moving party has met its burden under Rule 56." Dan Barclay, Inc. v. Stewart & Stevenson Servs., Inc., 761 F. Supp. 194, 197-98 (D. Mass. 1991). When the applicable standard is applied to the instant case, this court concludes that there are no genuine issues of material fact and that the City is entitled to judgment as a matter of law. Therefore, this court recommends that the plaintiff's motion for summary judgment be denied and that the City's motion for summary judgment be allowed.

B. Mootness

The City asserts the plaintiff's claims should be dismissed as moot "because his request for relief has been satisfied by the mutually agreed upon stipulation which grants the Plaintiff unlimited

and unfettered access to the property." (Def. Mem. (Docket No. 36) at 2). This court disagrees. Although the Stipulation provides Dickey with access to the Property, it does not fully satisfy Dickey's claims for relief. In addition, the City has not shown that the challenged conduct is not reasonably likely to recur. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." Kiedos v. Apfel, 45 F. Supp. 2d 80, 84 (D. Mass. 1999) (quoting North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 30 L. Ed. 2d 413(1971)). "[W]hen the parties are asking for an advisory opinion, [or] when the question sought to be adjudicated has been mooted by subsequent developments[,]" no case or controversy exists for the court to decide. Id. (quotations and citation omitted). "A case is not moot, however, if the issues presented are 'live' or if the parties retain a legally cognizable interest in the outcome." Id. (quotations and citations omitted). In the instant case, the parties' Stipulation does not grant Dickey all of his requested relief. As set forth in his Complaint, Dickey is seeking relief in the form of a permanent injunction precluding the City from denying him access to and control over the Property, entering the Property without a valid warrant or emergency, and seizing from Boston property owners buildings that have been condemned pursuant to the State Sanitary Code. While the Stipulation provides Dickey with unconditional access to the Property, and authorizes ISD to inspect the Property only to confirm that Dickey has complied with his

obligation to repair it, there is nothing in the Stipulation which would prevent ISD from asserting control over the Property in the future. (DF ¶ 12; Stipulation). Therefore, the Stipulation does not satisfy Dickey's request for a permanent injunction precluding ISD from "seizing buildings from property owners in the City of Boston that are condemned by Defendant pursuant to 105 C.M.R. 410.831 of the State Sanitary Code." (Compl. at p. 7). Even if the Stipulation did provide Dickey with all of the relief he was seeking, the defendant would not be entitled to dismissal on the grounds of mootness. "Where during litigation a defendant ceases to engage in challenged conduct and restores the *status quo ante*, the lawsuit may or may not be moot." Adams v. Bowater Inc., 313 F.3d 611, 613 (1st Cir. 2002). "[S]uch a case is moot only if the defendant meets his 'heavy burden' of persuading the court that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Id. The City has not attempted to meet this burden. Furthermore, the undisputed facts indicate that ISD will continue to engage in the challenged conduct. It is undisputed that ISD's challenged conduct in boarding up and assuming control over the Property occurred as part of its ordinary custom and practice with respect to condemnation proceedings. The City has not indicated that ISD intends to abandon this practice or to provide further notice and opportunities for property owners to be heard with respect to this practice. Rather, the City argues that ISD's actions were

appropriate, therefore making it reasonably likely that the challenged conduct will recur. See id. ("where a defendant is unwilling to give any assurance that the conduct will not be repeated, a natural suspicion is provoked that recurrence may well be a realistic possibility"); Mendez-Soto v. Rodriguez, 448 F.3d 12, 15 (1st Cir. 2006) (agency's continued position that disputed procedure was valid created a reasonable likelihood of recurrence). Accordingly, the City is not entitled to summary judgment on the grounds of mootness.

C. Alleged Violations of Dickey's Constitutional Rights

1. Municipal Liability Under 42 U.S.C. § 1983 – In General

Dickey is seeking to hold the City liable, pursuant to 42 U.S.C. § 1983, for violations of his constitutional rights. In such cases, "[a]ssessing liability against the City requires two basic elements: first, that plaintiff's harm was caused by a constitutional violation, and second, that the City be responsible for that violation . . . ." Young v. City of Providence, 404 F.3d 4, 25-26 (1st Cir. 2005). In order to meet the second element, "a plaintiff must show that a policy or custom of the city led to the constitutional deprivation alleged. This requires that plaintiff demonstrate both the existence of a policy or custom and a causal link between that policy and the constitutional harm."

Santiago v. Fenton, 891 F.2d 373, 381 (1st Cir. 1989) (internal citation omitted).

The City contends that it is entitled to judgment as a matter of law because Dickey was not deprived of any constitutional rights. This court agrees, and finds that the City is entitled to summary judgment.[7]

2. Alleged Violation of Fourth Amendment Rights

Dickey claims that ISD's actions in boarding up and taking control of his Property constituted an unconstitutional seizure in violation of his rights under the Fourth Amendment. (Compl., Count I; see also Pl. Mem. at 6). Although ISD's conduct may be considered a "seizure" subject to scrutiny under the Fourth Amendment, Dickey cannot establish that such conduct was unreasonable under the circumstances presented in this case. Therefore, the City is entitled to summary judgment with respect to this claim. "The Fourth Amendment, made applicable to the States by the

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[7] In light of this court's conclusion that Dickey was not deprived of his constitutional rights, it is unnecessary to address the City's contention that Dickey is not entitled to argue that ISD's conduct occurred pursuant to a custom, practice or policy because he failed to allege the existence of any such custom, policy or practice in his complaint. (See Def. Mem. at 4-5).

Fourteenth, provides in pertinent part that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .'" Soldal v. Cook County, Ill., 506 U.S. 56, 61, 113 S. Ct. 538, 543, 121 L. Ed. 2d 450 (1992) (internal citation omitted). A "seizure" of property "occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" Id. (quoting United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984)). However, even where a seizure has occurred, the issue "[w]hether the Amendment was in fact violated is, of course, a different question that requires determining if the seizure was reasonable." Id. at 61-62, 113 S. Ct. at 543. A determination of reasonableness must be based upon "a 'careful balancing of governmental and private interests.'" Id. at 71, 113 S. Ct. at 549 (quoting New Jersey v. T.L.O., 469 U.S. 325, 341, 105 S. Ct. 733, 742, 83 L. Ed. 2d 720 (1985)). In the instant case, ISD's conduct meaningfully interfered with Dickey's possessory interests in the Property. The record demonstrates that ISD's actions in boarding up the building and condemning the Property restricted Dickey's access to the premises. Even after Dickey obtained relief from the Superior Court, his access was limited to business hours and he was not able to enter the dwelling at the Property unless an ISD employee was there to let him in. (See PF ¶¶ 5-7) Thus, ISD effectuated a seizure under the Fourth Amendment. Nevertheless, there is nothing to suggest that ISD's conduct was

unreasonable given the circumstances presented in the record. The undisputed facts show not only that the Property was uninhabitable, but also that conditions there were so severe that the police were called to the premises and a Housing Inspector declared an emergency in order to protect the public health under the Sanitary Code. (See Def. Exs. C & D); see also Smith v. City of Boston, No. 03-10062-DPW, 20044 WL 1572626, at *4 (D. Mass. July 13, 2004) (no Fourth Amendment violation where emergency situation caused by property condition justified warrantless entry by ISD). The evidence also establishes that ISD notified Dickey of the condemnation hearing by posting an emergency order at the Property, thereby providing him with an opportunity to contest the department's actions. (DF ¶ 8; PR ¶ 8; see also Def. Ex. D). "Where a building is seized because of the danger it poses and adequate recourse is provided to challenge any action taken by the local government, the seizure does not violate the Fourth Amendment." Gardner v. McGroarty, 68 Fed. Appx. 307, 312, 2003 WL 21310845, at *4 (3d Cir. Jun. 9, 2003).

Dickey agrees that if a building that violates the Sanitary Code is accessible to trespassers, it should be boarded up or otherwise secured.[8] (Pl.

[8] To the extent Dickey contends that the dwelling on the Property was already secure, the record indicates otherwise. It is undisputed that the dwelling was vacant, that animals had gotten into the building, and that NSTAR was able to enter the building pursuant to its warrant. (See Def. Ex.

Mem. at 6). He argues, however, that ISD is not authorized under the State Sanitary Code to secure private property itself or to deny the owner access for purposes of maintaining the property. (Id. at 6-7). This court finds that ISD's decision to secure Dickey's building itself was reasonable for purposes of the Fourth Amendment analysis. Furthermore, the evidence shows that Dickey was not denied access sufficient to repair the Property. Under the State Sanitary Code, once a dwelling has been declared to be unfit for human habitation, "the board [of health] may issue an order condemning the dwelling or portion thereof . . . and an order requiring the owner to secure the dwelling or portion thereof." 105 C.M.R. § 831(E). However, ISD's decision to secure the dwelling on its own, without waiting to locate the owner and to see if he would comply with an order, was appropriate in this case. The Property was vacant and conditions there indicated that the dwelling had been abandoned. Furthermore, it is undisputed that the Property posed a danger to the general public, and that ISD boarded up the dwelling in order to safeguard the public. (See Def. Ex. F; Pl. Ex. E-1). "[T]he City has a strong interest in ensuring that structures located within City bounds do not pose a threat to the safety of the general public." Gariffo Real Estate Holdings Co., Inc. V. City of Philadelphia, C.A.

C) Boarding up the building was a reasonable means of protecting the Property from wildlife and trespassers

No. 05-6153, 2007 WL 1410607, at *5 (E.D. Pa. May 11, 2007). In comparison, "[t]he Plaintiff retained little or no reasonable expectation . . . in a dilapidated, uninhabited rental property" after ISD notified him of its dangerous condition. Id. Therefore, in balancing the relative interests involved, this court concludes that ISD's decision to secure the Property without delay was reasonable. Moreover, the record before this court does not support Dickey's argument that he was denied access to the Property in order to clean it up. As evidenced by the emergency order that ISD posted at the Property, and by the Hearing Officer's Notice of Decision on the condemnation, ISD contemplated that Dickey would perform work at the Property in order to bring it into compliance with the State Sanitary Code. In particular, the emergency order provided that the dwelling on the Property would remain vacant "until all violations are corrected" and ISD conducts a final inspection. (Def. Ex. D at 2). Similarly, the Notice of Decision provided a list of conditions that Dickey needed to fulfill in order to lift the condemnation. (See Def. Ex. F). These included, among others, cleaning and sanitizing the entire dwelling. (Id.).[9] The fact that the Notice of Decision did not specifically inform Dickey as to how he could obtain access to

[9] During the condemnation hearing, the Hearing Officer stated that she was upholding the condemnation "with the understanding that the owner, if we find the owner or the owner becomes available, must clean the property ...." (Def. Ex. E at 3).

his building does not establish that ISD intended to preclude him from repairing the Property. The record also shows that after Dickey filed his motion for a temporary restraining order in state court, ISD agreed to an order allowing Dickey to access the Property during weekdays. (Pl. Ex. D-1). This evidence further demonstrates that ISD was willing to work with Dickey so that he could cure the violations at the Property and lift the condemnation. To the extent Dickey was dissatisfied with the Superior Court's order, he could have sought to modify it. In short, the record demonstrates that ISD acted reasonably in order to protect the general public. Therefore, its seizure of the Property did not violate Dickey's Fourth Amendment rights.

3. Alleged Violation of Procedural Due Process

Dickey claims that ISD's failure to provide him with notice and a hearing on the seizure of his Property, separate and apart from the notice and hearing on the condemnation, violated his right to procedural due process. (Compl., Count I; see also Pl. Mem. at 2). The undisputed facts demonstrate that the City provided Dickey with an adequate means of redress with respect to ISD's actions concerning his Property. Therefore, Dickey has not been deprived of due process. "The Fourteenth Amendment prohibits a state from 'deprivling] any person of life, liberty, or property, without due process of law . . . .'" Elsmere Park

Club, L.P. v. Town of Elsmere, 542 F.3d 412, 417 (3d Cir. 2008) (quoting U.S. Const. amend. XIV, § 1) (alteration in original). With respect to procedural due process claims such as Dickey's, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*.... The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. Lowe v. Scott, 959 F.2d 323, 340 (1st Cir. 1992) (quoting Zinermon v. Burch, 494 U.S. 113, 125-26, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990)). In the instant case, Dickey does not dispute that he was provided with due process in connection with the condemnation of his Property. Indeed, the undisputed facts demonstrate that when ISD seized Dickey's Property on an emergency basis, it provided him with notice of a condemnation hearing by posting an order at the Property that contained the date, time and place of the hearing. (See Def. Ex. D). The record further shows that a condemnation hearing was held on the scheduled date and that Dickey has had an opportunity to appeal the Hearing Officer's Notice of Decision in court. (See Def. Ex. E; Pl. Ex. D-2 at Affidavit ¶ 6). This is all that due process requires. See Herwins v. City of

Revere, 163 F.3d 15, 18-19 (1st Cir. 1998) (no procedural due process violation where city ordered emergency closure of plaintiff's building without prior hearing but plaintiff had post-deprivation means of seeking redress); Elsmere Park Club, L.P., 542 F.3d at 414 (no violation of procedural due process where town condemned plaintiff's apartment complex without pre-deprivation hearing, but provided adequate post-deprivation process by way of administrative appeal).

Dickey nevertheless argues that his right to procedural due process was violated because the defendant failed to provide him with separate notice and a hearing to address the seizure of his Property. (Pl. Mem. at 2). This argument is unpersuasive. The evidence shows that ISD's actions in boarding up and assuming control over the Property occurred as part of the condemnation process. Nothing prevented Dickey from challenging these actions at the condemnation hearing or in any subsequent appeal. In fact, at the condemnation hearing, the Hearing Officer specifically addressed the fact that the dwelling had been boarded up and needed to remain secure. (See Def. Ex. E at 3). Had Dickey been present, he could have presented his arguments as to why this was inappropriate. Instead, Dickey chose to seek relief in state Superior Court, where he was afforded an opportunity to be heard. Thus, the

undisputed facts demonstrate that Dickey has not been deprived of procedural due process.[10]

IV. CONCLUSION

For all of the reasons detailed above, this court recommends to the District Judge to whom this case is assigned that Dickey's "Motion in Opposition of Dismissal of Complaint" (Docket No. 14) and the City's "Motion to Dismiss Plaintiff's Complaint" (Docket No. 30) both be DENIED AS MOOT, that the "Plaintiffs, James Dickey, Motion for Summary Judgment" (Docket No. 25) be DENIED and that the "City of Boston's Motion for Summary Judgment" (Docket No. 35) be ALLOWED.[11]

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[10] Because Dickey cannot prove a violation of his constitutional rights, his claim for injunctive relief must fail. See Aponte v. Calderon, 284 F.3d 184, 191 (1st Cir. 2002) (in order to grant a permanent injunction, the court must find, among other elements, that the plaintiff prevails on the merits), cert. denied, 537 U.S. 886, 123 S. Ct. 128, 154 L. Ed. 2d 145 (2002).

[11] The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72 any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this Rule shall preclude further appellate review. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 275 (1st Cir. 1988); United States v.

/ s / Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge

Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604-605 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also Thomas v. Arn, 474 U.S. 140, 153-54, 106 S. Ct. 466, 474, 88 L. Ed. 2d 435 (1985). Accord Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 3-4 (1st Cir. 1999); Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir. 1994); Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 4 (1st Cir. 1998).

Appendix C

Project Pride – No Trespassing Sign